Dindings Poultry Processing Sdn Bhd v Super Kinta Departmental Stores Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D8–28–41 OF 2005
LEE SWEE SENG JC
23 DECEMBER 2011

Companies and Corporations — Winding up — Opposition to petition — Whether respondent deposed it was solvent or able to pay that part of petitioner's debt not disputed — Whether any bona fide dispute of petitioner's debt raised — Whether deponent of petitioner's affidavit should be cross-examined

The High Court had earlier wound up the respondent after dismissing three interlocutory applications the respondent had filed in the proceedings which included an application to strike out the petition and an application to cross-examine the deponent of the affidavit verifying the petition. The respondent appealed to the Court of Appeal against the winding up order as well as against the dismissal of the interlocutory applications. At the appeal hearing, the official receiver withdrew the appeals concerning the interlocutory applications. The Court of Appeal set aside the winding up order on the sole ground it was improper for the order to have been granted on a mention date. The petition was remitted back to the High Court to be heard. The petition was grounded on the respondent's inability to pay its debt to the petitioner for goods sold and delivered and services rendered. Prior to the rehearing of the petition, the respondent, as it had done before, again filed an application ('encl 50') to strike out the petition and an application ('encl 52') to cross-examine the petitioner's deponent. The respondent contended its previous similar applications were not heard on the merits as its counsel then was not in court on the hearing date.

Held, allowing the petition to wind up the respondent and dismissing encls 50 and 52 with costs:

(1) Under both the plea of res judicata and the principle of issue estoppel, the respondent could not file a second application to strike out the petition based on the same ground in the same proceeding at a different and subsequent stage (see para 10).

(2) The previous application to strike out the petition was dismissed and not struck out. In other words, rightly or wrongly, the judge had applied his mind to the application and had decided to dismiss it (see para 13).

(3) Enclosure 50 did not state under which limb the respondent was

proceeding other than that the petition 'be struck out pursuant to Order 18 Rule 19 of the Rules of the High Court 1980'. Such an application was fatally flawed (see paras 18 & 19).

(4) At no material time did the respondent dispute the petitioner's claim. It just made a feeble attempt, without evidence, to create a dispute on the debt when there was none (see para 22).

(5) No useful purpose was served by allowing the deponent of the affidavit to be cross-examined. All the necessary documents that needed to be exhibited had been exhibited. The respondent had nothing in terms of documentary evidence to contradict the deponent of the petitioner's affidavit (see para 30).

(6) Nowhere in the affidavit to oppose the petition did the respondent aver it was solvent and able to pay its debts, at least the part substantially not in dispute, assuming for a moment the dispute raised was bona fide (see para 41).

[Bahasa Malaysia summary

Mahkamah Tinggi pada awalnya telah menggulung responden selepas menolak tiga permohonan interlokutori yang difailkan oleh responden di dalam prosiding yang termasuk permohonan untuk membatalkan petisyen dan permohonan untuk memeriksa balas deponen terhadap afidavit yang mengesahkan petisyen tersebut. Responden merayu kepada Mahkamah Rayuan terhadap perintah penggulungan dan juga terhadap penolakan permohonan-permohonan interlokutori. Pada masa pendengaran rayuan pegawai penerima menarik rayuan-rayuan berkaitan permohonan-permohonan interlokutori. Mahkamah Rayuan mengenepikan perintah penggulungan atas satu-satunya alasan bahawa adalah tidak betul untuk perintah diberikan pada tarikh sebutan. Petisyen tersebut diremit semula ke Mahkamah Tinggi untuk didengar. Petisyen tersebut adalah berdasarkan ketidakupayaan responden untuk membayar hutangnya kepada pempetisyen untuk barang-barang yang dijual dan dihantar dan khidmat yang disediakan. Sebelum pendengaran semula petisyen tersebut, responden, seperti yang telah dilakukan sebelumnya, sekali lagi memfailkan permohonan ('lampiran 50') untuk membatalkan petisyen tersebut dan permohonan ('lampiran 52') untuk memeriksa balas deponen pempetisyen. Responden berhujah permohonan-permohonannya yang sama sebelumnya tidak didengar atas merit memandangkan peguamnya pada masa tersebut tidak hadir pada tarikh pendengaran tersebut.

Diputuskan, membenarkan petisyen untuk menggulung responden dan menolak lampiran-lampiran 50 dan 52 dengan kos:

(1) Di bawah kedua-dua pli res judicata dan prinsip isu estopel, responden tidak boleh memfailkan permohonan kedua untuk membatalkan

petisyen tersebut berdasarkan atas alasan yang sama dalam prosiding yang sama pada peringkat lain dan berikutnya (lihat perenggan 10).

(2) Permohonan sebelumnya untuk membatalkan petisyen tersebut ditolak dan bukan dibatalkan. Dalam perkataan lain, betul atau salah, hakim telah mempertimbangkan permohonan tersebut dan telah memutuskan untuk menolaknya (lihat perenggan 13).

(3) Lampiran 50 tidak menyatakan di bawah bahagian yang mana permohonan responden dimulakan selain daripada bahawa petisyen tersebut 'be struck out pursuant to Order 18 Rule 19 of the Rules of the High Court 1980'. Permohonan sedemikian adalah cacat (lihat perenggan 18 & 19).

(4) Tidak pada mana-mana masa material defendan mempertikaikan tuntutan pempetisyen. Ia hanya membuat percubaan yang lemah, tanpa keterangan, untuk membentuk pertikaian atas hutang apabila ianya tidak wujud (lihat perenggan 20).

(5) Tiada tujuan yang bermakna apabila membenarkan untuk deponen afidavit diperiksa balas. Kesemua dokumen yang perlu dikemukakan telah dikemukakan. Responden tidak mempunyai apa-apa dari segi keterangan dokumen untuk menentang deponen terhadap afidavit pempetisyen (lihat perenggan 30).

(6) Sama sekali tidak terdapat di dalam afidavit untuk menentang petisyen responden menegaskan ia adalah solven dan dapat membayar hutang-hutangnya, sekurang-kurangnya bahagian tersebut sebahagian besarnya tidak dipertikaikan, dengan menganggap seketika bahawa pertikaian yang dibangkitkan adalah bona fide (lihat perenggan 41).]

Notes

For cases on opposition to petition, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1453–1500.

Cases referred to

Ann Joo Metal Sdn Bhd v Pembenaan MY Chahaya Sdn Bhd [2000] 5 MLJ 708, HC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57; [1997] 2 CLJ 104, CA (folld)

Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Hong [1987] 1 MLJ 139 (refd)

Koperasi Belia Nasional Sdn Bhd v Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 MLJ 209; [1998] 3 CLJ 335, CA (refd)

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789, HC (folld)

Malaysian Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 4 MLJ 657, FC (folld)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187, CA (refd)
Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd [2000] 6 CLJ 290, HC (refd)
Nima Travel Sdn Bhd; Sun Soon Heng Coach Works Sdn Bhd, Re v Nima Travel Sdn Bhd [1986] 2 MLJ 374 (refd)
NKM Development Sdn Bhd v Irex Sdn Bhd [1988] 2 CLJ (Rep) 56, HC (refd)
Pacific Bank Bhd, The v Chan Peng Leong [1998] 2 MLJ 613; [1998] 2 CLJ 440, CA (refd)
Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124, FC (refd)
Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd [2009] 2 MLJ 102; [2010] 2 CLJ 457, CA (refd)
Regional Centre for Arbitration v Ooi Beng Choo & Anor [1998] 2 MLJ 383, HC (folld)
Syarikat Tungaring Kilang Papan Sdn Bhd v Sabah Forest Industries Sdn Bhd & Ors [1990] 2 MLJ 38, HC (folld)
Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-operative Central Bank Ltd [2007] 4 MLJ 638, CA (folld)
Transwater Corporation Bhd lwn Idris Hydraulic (Malaysia) Bhd [2001] 1 CLJ 162, HC (refd)

Legislation referred to

Companies Act 1965 s 218, 218(2)(a)
Evidence Act 1950 s 92
Rules of the High Court 1980 O 18 r 19, 19(1)

Vanaja Nambiar (Isharidah, Ho, Chong & Menon) for the petitioner.
Sivasankar (Sankar & Co) for the respondent.

Lee Swee Seng JC:

PROLOGUE

[1] There is a bit of history to this winding up petition. It was filed on 17 January 2005. On 1 August 2007 the respondent filed three interlocutory applications. One was an application for extension of time to file an affidavit to oppose the petition ('encl 17'). Another was an application to strike out the petition ('encl 14') and the third was an application to cross-examine the deponent of the affidavit verifying the petition of one Dr Yap Teow Chong ('encl 20').

[2] On 3 September 2007, the court dismissed encl 17 with costs and the

court also proceeded to dismiss encls 14 and 20 with costs. The court also on the same date granted an order in terms of the petition and the respondent was accordingly wound up.

PROBLEM

[3] The petitioner is the petition had stated in para 5 that the respondent is indebted to the petitioner in the sum of RM74,092.63 being the balance outstanding sum for goods sold and delivered and services rendered to the respondent and had also set out the particulars of the invoices in terms of its number, date and amount invoiced. The various statements of account and invoices were annexed to the petition and marked exh DPP1. The petition was verified by an affidavit verifying the petition.

[4] There was also an averment in para 6 that a s 218 of the Companies Act statutory notice had been served on the respondent at its registered office giving the usual 21 days to pay the debt failing which the respondent would be deemed to be unable to pay its debts and appropriate action will be taken for the winding up of the respondent.

[5] There was the usual averment by para 7 of the petition that over three weeks had lapsed since the statutory demand was served but the respondent had failed and neglected to pay or satisfy the said sum or any part thereof or to make any offer to the petitioner to secure or compound the same.

[6] The petitoner continued in paras 8 and 9 of the petition to state that the respondent is unable to pay its debts and that in the circumstances it is just and equitable that the respondent be wound up. The petitioner prayed for the respondent to be wound up and for the Director General of Insolvency to be appointed the provisional liquidator and for costs to be paid put of the assets of the respondent.

[7] After the winding up order was made the respondent filed four notices of appeal to the Court of Appeal against each of the interlocutory application that was dismissed as well as the winding up order. On the hearing of the appeals on 14 March 2011, the official receiver from the Insolvency Department withdrew the appeals with regard to the decisions on the three interlocutory applications and as such the appeals were struck out. With respect to the appeal against the winding up order, the Court of Appeal allowed the appeal on the sole basis that it was improper to grant a winding up order on a mention date and the Court of Appeal further ordered that the winding up order be set aside and the matter be reverted to the High Court for a hearing date to be fixed for the hearing of the petition.

[8] On 17 August 2011, the respondent filed another application to strike out the petition in encl 50 and also another application in encl 52 to cross-examine Dr Yap Teow Chong with respect to his affidavit affirmed on 18 January 2005. Both encls 50 and 52 were fixed on the same day as the hearing of the petition.

PRINCIPLES

Application to strike out petition — encl 50

[9] Learned counsel for the petitioner rightly objected to the filing for a second time an application to strike out the petition in encl 50. The respondent having failed the first time to strike out the petition and had appealed against the decision of the High Court then only to withdraw the appeal before the Court of Appeal cannot now be allowed to relitigate the issue that had already been determined by the court. There must be a finality to litigation with respect to the same issue canvassed before the court and more so when there had been an appeal against the court's decision on the issue only to have the appeal withdrawn in the Court of Appeal.

[10] The principle of res judicata as applied by our courts have been expounded in a number of cases. His Lordship Gopal Sri Ram JCA (later FCJ), in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd,* [1996] 2 MLJ 57 at p 63; [1997] 2 CLJ 104 at pp 110–111 recounted the brief facts as follows:

> … Counsel for the respondent took a preliminary objection as to the correctness of the procedure employed by the appellants. The learned judge, having heard argument on the point, ruled against the respondent and adjourned the hearing on merits to another date …
>
> When the appellants' motion came to be heard on its merits on 17 August 1994, counsel for the respondent invited the court to re-open its earlier procedural ruling. The learned judge acceded to this request, heard argument afresh on the point, reversed his earlier decision, upheld the preliminary objection and dismissed the appellants' application. It is against that decision of the learned judge that the present appeal was brought.

[11] His Lordship proceeded to state rigourously the rationale for the principle of res judicata at pp 65–66 (MLJ); pp 113–114 (CLJ):

> … The learned judge, on 13 October 1993, was faced with an objection as to the form of proceedings which had been adopted by the appellants. He came to the conclusion that the form chosen by the appellants was not irregular. Although that was a decision made on an interlocutory matter which was purely procedural in nature it was nevertheless binding on the court and on all parties to the lis until its reversal on appeal. In our judgment the decision of the learned judge overruling the

respondent's preliminary objection rendered the point taken res judicata. If authority is needed for the proposition which has commended itself to us, it is to be found in *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74; [1973] 1 LNS 35 which was drawn to the attention of counsel during argument and in which there appears the following passage in the judgment of Sharma J (at p 76): In *Satyadhyan Ghosel and others v Sint Deorajin Dobi & Another* AIR 1960 SC 941, the statement of the law on the subject is given thus: The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s 11 of the Code of Civil Procedure; but even where s 11 does not apply, the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation. *The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.*

The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit (see *Peareth v Marriott* (1883) 22 Ch D 182, *Hook v Administrator General of Bengal and Others LR 48 IA 187* and *In the Matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v Tan Yew Ghee and Another* [1936] MLJ 141–147–151; [1936] 1 LNS 23). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication (see *Louis Dreyfus v Aruna Chalayya* LR 58 IA 381). (Emphasis added.)

A failure to adhere to the principle expressed in the judgment of Sharma J just quoted may lead to chaos in the conduct of civil proceedings. The facts of this very case afford a good illustration of such a consequence. We have here an earlier decision by the judge upon a procedural issue determining it in the appellants' favour. Then along comes the respondent at the adjourned hearing and applies to the judge to re-open the issue and review his earlier decision. The judge obliged and reversed himself. What was there to prevent the appellants from proceeding with an application to the judge to re-review his decision reversing himself? On the assumption of the law made by counsel before us there would have been no bar to the judge undertaking such an exercise. The process could then be repeated ad infinitum with no conclusion. It would be a circular tail chasing exercise with no forward movement, proving to the man on the street that the maxim 'the law is an ass' is not without content. The absurd results that would ensue in accepting the contention of counsel demonstrates the inaccuracy of the proposition advanced.

[12] In the present case the order of the High Court dated 3 December 2007 where relevant reads as follows:

> THIS COURT DOTH ORDERED that since the Respondents Application for Enclosure 17 is dismissed with costs, the Respondent's Application Enclosure 14 and Enclosure 20 be dismissed with costs.

[13] Nothing could be clearer; the previous application to strike out the petition in encl 14 was dismissed and not struck out. In other words, rightly or wrongly the learned judge had applied his mind to the application and had decided to dismiss the application. The respondent had appealed but on the date of hearing the appeal, it had through the official receiver, withdrawn the appeal. It cannot now be allowed to file another application based on the same ground in the same proceeding at a different and subsequent stage for to do so would offend the principle of res judicata. It is to have the second bite at the cherry.

[14] Likewise the respondent having filed a first application to strike out the petition and the petition having being dismissed, the respondent is estopped from filing the same application in the same proceeding or even a subsequent proceeding. The respondent was not precluded from exercise its prerogative to appeal which it did only to have the appeal withdrawn in the Court of Appeal. His Lordship Peh Swee Chin FCJ, in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd,* [1995] 3 MLJ 189 at pp 197–198; [1995] 3 CLJ 783 at p 791 explained the link between res judicata and estoppel with such lucidity:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicature. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that it is in the public interest that there should be finality in litigation — interest rei publicae ut sit finis litium. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

[15] His Lordship continued at p 200 (MLJ); pp 793–794 (CLJ):

> It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.
>
> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence

or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata ie, doctrine of estoppel per rem judicatum.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

It is further necessary at this stage to understand the import of the words in the said famous statement ie, '… every point which properly belonged to the subject of litigation …' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255, 257 as follows:

> … res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[16] I hold that under both the plea of res judicata and the principle of issue estoppel, the respondent cannot file a second application to strike out the petition.

[17] However learned counsel for the respondent contended that the first application to strike out and to cross-examine the deponent of the affidavit had not been heard on merits as the counsel for the respondent/applicant then was not present in court on the date of hearing of both the said applications. If that were so then the applications should have been struck out instead of being dismissed. References were made to the case of *Koperasi Belia Nasional Sdn Bhd v Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 MLJ 209; [1998] 3 CLJ 335 and *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 CLJ 613; [1998] 2 CLJ 440.

[18] Whilst I have to reject this argument of the respondent's counsel I am prepared to assume for a moment that the plea of res judicata and the principle of estoppel do not apply. Looking at the application to strike out the petition, it does not state under which limb the respondent is proceeding other than that the petition 'be struck out pursuant to Order 18 Rule 19 of the Rules of the High Court 1980 (RHC) …'

[19] Such an application is fatally flawed as was held in the Court of Appeal case of *Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd* [2009] 2 MLJ 102 at pp 116–117; [2010] 2 CLJ 457 at p 473 where His Lordship, Abdul Malik Ishak JCA observed:

> The plaintiff's application to strike out the defendant guarantor's counterclaim was flawed for the simple reason that it failed to specify under what limb of O 18 r 19 of the RHC was the application made. While sitting on the High Court bench, I did say in *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor* [1997] 1 CLJ 775, 778 that:
>
> > The word 'or' appears between (a), (b), (c) and (d) of O 18 r 19(1) of the RHC and in ordinary usage the word 'or' is said to be disjunctive (*Uddin v Associated Portland Cement Manufacturers Ltd* [1965] 2 QB 582: *R v Surrey Quarter Sessions, ex parte Commissioner of Metropolitan Police* [1963] 1 QB 990). In my judgment, the second defendant when resorting to O 18 r 19(1) of the RHC must be very specific and must not cumulatively add (a), (b), (c), (d) together and lump them as one as it would run counter to the explicit provisions of r 19(2) of O 18 of the RHC.
>
> It is comforting to know that *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor* was vigorously applied by Faiza Tamby Chik J in *Monatech (M) Sdn Bhd v Jasa keramat Sdn Bhd & Anor* [1998] 1 LNS 401 and by Abdul Hamid Mohamad J (later the Chief Justice of Malaysia) in *Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd & Yang Lain* [2002] 2 CLJ 601.

[20] One must be reminded afresh of the strictures set out by His Lordship Abdul Hamid Mohamad JCA (later CJ of Malaysia) in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 at pp 203–205 where it was sternly stated:

> As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications that would invariably stall the hearing of the petition proper. If the application is dismissed, the respondent would appeal to the Court of Appeal, or may even try to go further, further delaying the hearing of the petition. I have come across cases where even an order made by the senior assistant registrar under r 32 of the Companies (Winding-up) Rules 1972 ('the Rules') was appealed against, and when the appeal was dismissed, the respondent further appealed to the Supreme Court — see *Asia Commercial Finance (M) Bhd v Lum Choon Realty Sdn Bhd Penang* High Court Winding Up No 28–60 of 1992. Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. The effect is that the hearing and disposal of the petition is delayed.

One of the most abused procedures adopted in winding up proceedings is the application to strike out the petition under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') and/or the inherent jurisdiction of the court.

In *Buildcon-Cimaco Concrete Sdn Bhd*, I pointed out the undesirability of applying such procedurs to a winding up petition:

> Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for as 218 winding up petition which is more simplified and geared for speedy disposal. The Rules of the High Court 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O 14), striking out of pleadings (O 18 r 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with, and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, the procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear cut cases.
>
> The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg service, advertisement, compliance with r 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.
>
> Furthermore, more often than not, resort to O 18 r 19 of the RHC 1980 in winding up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition.
>
> Application is made for it to be heard first, supposedly, to save the court's time.
>
> In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will.the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

These views were reiterated in *Antara Elektrik Sdn Bhd v Bell & Order Bhd*, this time in Bahasa Malaysia.

In *Sun Microsystems (M) Sdn Bhd*, I stressed the difference between the procedure in respect of a writ action under the RHC and a winding up petition under the Rules:

> It is important to note that the procedure in a winding up proceeding, as provided by the Companies (Winding-up) Rules 1972, is different from the procedure in a writ action as provided by the Rules of the High Court 1980 ('the HRC'). In a winding up proceeding, the procedure is simple and brief. That is

what it is meant to be. When a petition is filed, the senior assistant registrar gives a hearing date straightaway before the petition is issued. The petitioner is expected to do everything he or it has to do in terms of complying with the procedural requirements eg, serving, gazetting and advertising, before the hearing date. The petition is to be heard on the date fixed for hearing.

On the other hand, in a writ action, upon filing, no date (be it for hearing or for mention) is given by the senior assistant registrar. He merely signs the writ and issues it. The writ itself clearly says:

> We command you that within eight days after the service of this writ on you, inclusive of the day of such service, *you do cause an appearance to be entered for you* at the suit of … And take notice, that in default of you so doing the plaintiff may proceed therein to judgment and execution.' (Emphasis added.)

The trial date is a long way off. Indeed, there may not be any at all.

It is important that the procedure applicable in a writ action should not be incorporated into a winding up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action, so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for directions and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc in a winding up proceedings.

Finally, the same view was reiterated in *SP Setia Bhd*.

Having written on it four times and in two languages, it is timely that my learned brother Gopal Sri Ram JCA and this court come out strongly against such practices, which, at the very least is delaying the hearing and disposal of winding up petitions, which is unfair to the petitioners and clogging the court docket.

[21] Whilst the respondent failed to obtain an extension of time to file its affidavit to oppose the petition, the respondent took the opportunity to file an affidavit to oppose the petition on 23 August 2011 seeing that the Court of Appeal had reverted the case back on appeal to the High Court for the hearing of the petition. The only contention of the respondent that is relevant is at para 13 which reads:

> It was agreed by the Petitioner and Respondent that the Petitioner would only be paid once the goods ordered were sold and the account finalised between both parties.

[22] There was no evidence produced in support of that. Further at no

material time did the respondent ever dispute the petitioner's claim. Even if there is room for the understanding, there must at least be some reference to it in the invoice that the goods were sold on consignment or that payment would need only to be made after sale of the goods. There must be some evidence shown that the goods have not been sold by the respondent. Otherwise every respondent in order to strike out a petitioner's petition would always refer to some arrangement of this nature and the debt automatically becomes a disputed debt. Clearly such an approach and assertion cannot be allowed in the absence of some evidence pointing in that direction. The respondent had even ventured to say that some discounts were expected but unless there is something in writing such an assertion cannot be accepted for being too vague to be enforceable. What is the percentage of the discount if there was one to begin with? What about the amount outstanding after the purported discount is supposed to have been given and has the respondent made payments for that? There is a need for the respondent to descend to some details or else it would be just a feeble attempt to create a dispute on the debt when there is none. The same with credit notes and debit notes — the respondent must identify them rather than making a general statement that some of these had not been taken into account.

[23] At any rate based on the feeble assertion and in the absence of evidence to the contrary, I am not satisfied that the petition should be struck out at this stage. I had thus dismissed the application of the respondent with costs.

Application to cross-examine the deponent of the petitioner's affidavit verifying petition

[24] The reasons for subjecting the deponent of the above affidavit Dr Yap Teow Cheow to be cross-examined are set out in paras 4–6 of the affidavit in support of a director of the respondent, Encik Mohd Nor bin Abdul Raman filed on 17 August 2011:

4. The Petitioner director has claimed in the affidavit dated 18.1.2005 that there is a total of RM 74,092.62 owed by the Respondent.
5. It was agreed that a discount be given and that payment would be made once the goods had been sold.
6. The Petitioner had not honoured its obligations and as such the accounts cannot be finalised.

[25] With that the respondent contended that the deponent of the petitioner's affidavit ought to be cross-examined. The petitioner had stated in opposition to the application through a senior credit manager Mr Lee Hon

Choong by his affidavit filed on 25 August 2011 the following:

(a) that the statement of accounts and invoices showing how the sum of RM74,092.63 was arrived were exhibited and marked as exh DPP1 in the petition;

(b) that the petitioner had demanded for payment of the outstanding sum on nu eros occasions but, the respondent had refused and/or ignored and/or neglected to pay to the petitioner;

(c) thereafter the petitioner's solictors on 4 October 2004 had issued and served the statutory notice of demand under s 218 of the Companies Act 1965 on the respondent;

(d) then, on 15 October 2004, the petitoner's solicitors received a letter dated 11 October 2004 from the respondent's solicitors alleging that the debt was disputed on the basis that certain debit notes which were forwarded to the petitioner by the respondent was not taken into account and that the arrangement between both the parties were not of goods sold and delivered. However, no grounds to substantiate the respondent's allegation in respect of the arrangements were stated therein;

(e) the petitoner's solicitors responded by way of letter dated 19 October 2004 and demanded for a sum of RM74,092.63 which sum was derived at after taking into account the debit notes which was forwarded to the petitioner by the respondent. The said letter dated 19 January 2004 was exhibited and marked as exh LHC5;

(f) thereafter, on 27 October 2004, a second statutory notice of demand was issued on the respondent for the sum of RM74,092.63 exhibited as exh DPP2 in the petition;

(g) that the allegations of the respondent are inconsistent with contemporaneous documents;

(h) that based on undisputed contemporaneous documents the debt of RM74,092.63 was not and cannot be disputed by the respondent and that it was only after the notice of demand was served on the respondent that the respondent attempted to raise baseless, frivolous and unfounded allegations and that it was an afterthought; and

(i) that the cross-examination was not necessary as there is sufficient affidavit evidence supported by contemporaneous documents to enable the petition to be heard promptly.

[26] In the Court of Appeal case of *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-operative Central Bank Ltd* [2007] 4 MLJ 638 at pp 655–656, Zaleha Zahari as JCA in dismissing an application to cross-examine the deponent of an affidavit observed:

A judge clearly has a discretion under O 38 r 2(3) whether or not to allow cross-examination of a deponent on an affidavit. In exercising that discretion, it is necessary to determine how the proposed cross-examination would be relevant to the issue which the court is called upon to decide. On the facts of this case, the issue which the court has to decide at the review of taxation is whether the getting-up costs in respect of the three applications in issue were unreasonable …

I am in agreement with the decision of the learned judge that the issue can be decided without reference to any cross-examination and that a decision can be made from the contemporaneous documents in the court file in order to arrive at a decision on the matters in issue. The proposed cross-examination as to whether the appellant's firm or Vijay Kumar Natarajan himself was appointed to represent the respondent is at the best, of little relevance and the cross-examination was rightly refused as the contemporaneous records form the court file would clearly show the names of counsel form the appellant's firm who conducted the hearing of the applications in issue.

[27] Further in the case of *Regional Centre for Arbitration v Ooi Beng Choo & Anor* [1998] 2 MLJ 383 His Lordship Nik Hashim J (as he then was) at pp 391–392 had stated the principle thus:

It is settled law that the court retains an absolute discretion whether or not to allow to cross-examine a deponent on his affidavit. Generally, cross-examination will not be allowed unless there is a question of fact to be tried which requires viva voce testimony tested by cross-examination (see *Arab-Malaysian Merchant Bank Bhd v City Properties Sdn Bhd* [1992] 4 CLJ 2123), or where there are 'special circumstances': *Re Smith & Fawcett Ltd* [1942] 1 All ER 542; [1942] Ch 304. In the sphere of judicial review proceedings, it is a matter for the discretion of the court; it should not be allowed except where the court believes that it is necessary in order that justice may be done between the parties (per Lord Denning MR in *George v Secretary of State for Environment & Anor* (1979) 38 P & CR 609).

It is the contention of the respondent that the agreement would not assist the court on the issue of immunity as the agreement being retrospective in nature and procured well after the award was delivered and therefore requires an explanation by the deponent as to the manner in which it was obtained, and cited *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789 in support. In *Kumagai* it was held that:

> Whether cross-examination should be ordered in a matter like this (winding up petition) was within the discretion of the court and in this case, the approach of the court should be to examine the contemporaneous documents and the conduct of the parties. Here, the matter could be decided without reference to any cross-examination since there was abundant documentary evidence that was not disputed which would enable any court to arrive at a decision on the matter.

In the present case before me, the issue of immunity of the applicant is a question of law. The court has to decide the merit of the provisions of the agreement in the substantive motion. The agreement is an official document entered between the Government of Malaysia and the AALCC on the status of the applicant as an

international organisation. As far as the agreement is concerned, there are no disputed questions of facts which require affidavit evidence to be tested viva voce. In my view, the issue of immunity could be decided without reference to any cross-examination. Neither is the deponent's personal view relevant nor decisive on the legal question to be decided. In the result, I find that the respondent's affidavit in support of the application to cross-examination the deponent is devoid of any good grounds. Neither there are 'special circumstances' in this case. Accordingly, I hold that the respondent's application for cross-examination in encl (12) has no merit whatsoever, and hence the application is dismissed. However, under the circumstance of this application, I make no order as to costs.

[28] Yet another exercise of the court's discretion in disallowing an application to cross-examine can be seen in the case of *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789 at p 799 where His Lordship Anuar J (as he then was) explained the approach taken:

> Where a matter is being adjudged on affidavits, it is, I think, settled law that a mere assertion without more will not make the issue raised thereby to be triable viva voce evidence. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 when dealing with a case under O 14, the Supreme Court (by a majority) observed (at p 408) that:
>
> > … the duty of a judge does not end as soon as a fact is asserted by any one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements made by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

As I have pointed out, the foregoing statement of the principle was made in the context of an O 14 case. In my judgment, the same principle would apply where a case has been tried on affidavit evidence and I have adopted this approach in the present case.

In *Tan Sooi Shin v Kow Kek Hing*, VC George J refused cross-examination on the ground that judicial time would be wasted in the determination of an academic question.

I considered ail the circumstances of the case ant took into account the fact that cross-examination will not advance the cause of justice. In my judgment, the matter could be decided without reference to any cross-examination since there were abundant documentary evidence that was not disputed which would enable any court in my position to arrive at a decision on the matter. In exercising my discretion, I took into account all maters advanced by the petitioner and the respondents, and weighing these, I was satisfied that discretion should be exercised against the petitioner and I accordingly dismissed the application to cross-examine contained in encl 95.

[29] His Lordship Haidar J (as he then was) in *Syarikat Tungaring Kilang*

Papan Sdn Bhd v Sabah Forest Industries Sdn Bhd & Ors [1990] 2 MLJ 38 at pp 41–42 set out his reasons for disallowing an application to cross-examine a deponent of an affidavit in this wise:

> It is to be noted that both deponents explained at length on this issue and I do not think the granting of the application to cross-examine them on this issue is of real help. It will, at most, be a repetition of what they already deposed to in their affidavits. Encik Shafee indicated also that the deponents may be asked to explain how a license is processed. In my view, such explanation, if really necessary at this stage of the proceeding, should properly come from the Director of Forests, and not the deponents, especially Datuk Pairin, who is involved in policy matters and would not know, with respect, the mechanism of the processing of a timber license. In any event, the authorities tend to show that the courts are slow in granting such an application where the power to do so is discretionary. It is sufficient for me to quote a passage from the judgment of Lim Beng Choon J in the case of *Balwant Singh Purba v R Rajasingam* [1987] 2 CLJ 317 at p 317:
>
> > There is no dispute that the power given by the said O 38 r 2(3) is obviously a matter of discretion to be exercised by a court in accordance with well-known judicial principles. For purpose of this judgment I need only mention two of the principles. The first one is mentioned in the following passage appearing at p 592 of the English Supreme Court Practice (1979) Vol 1:
> >
> > > There is a discretion as to ordering cross-examination on affidavits filed on interlocutory application. Cross-examination upon affidavits sworn in applications for interlocutory injunctions is very rare.
> >
> > The second principle is that the power as conferred by the said O 38 r 2(3) can be invoked only in respect of an issue which the court is asked to determine in the interlocutory proceeding and not in respect of any other issue which should be determined at the trial of the action proper. In this connection reference may be made to *Abraham & Co v Dunlop Pneumatic Co* [1905] 1 KB 46 at p 52 where Mathew LJ said:
> >
> > > That applies only to a question of fact which the court or a judge has at the time jurisdiction to decide, and not to a question to be tried in the action. The question under which this appeal arises relates to an issue which must be tried in the action with the other issues, and is not a matter that can be determined at chambers.

[30] Based on the principles clearly enunciated in the above cases, I can see no useful purpose being served if the deponent of the affidavit were to be cross-examined. In the absence of any documentary evidence by the respondent, the deponent would be standing by his affidavit evidence which is based on contemporaneous commercial documents in the invoices and statements of account exhibited as well as the correspondence between the parties. In other words this is a case where all the necessary documents that needed to be exhibited had been exhibited and one wonders what useful

purpose may be served by the cross-examination. What does the respondent have in terms of documentary evidence that may be marshalled to contradict the deponent of the petitioner's affidavit? If there is, the respondent would have produced it. The procedure for winding up as prescribed under the Companies Act 1965 and the RHC is by way of petition supported by an affidavit verifying the various statements made in the petition. It is not by way of a writ action where viva voice evidence is the norm. Therefore to be entitled to cross-examine a deponent of any affidavit filed in support of or for that matter to oppose the petition, the applicant so applying must show some compelling reasons constraining the court in the interest of justice to so allow.

[31] The fact that the evidence of the petitioner contradicts that of the respondent is by itself not sufficient ground to warrant leave being granted to compell the deponent to come to court to be cross-examined by the other side. Were it so, it would have been very easy to convert what is supposed to be a petition heard on affidavits evidence into a trial where deponents of affidavits are being cross-examined in a proceeding no different from a writ action. That would be counter to the act and the rules made thereunder. I would therefore dismiss the application to cross-examine with costs.

Whether a winding up order ought to be made in the circumstances of the case

[32] The Court of Appeal when granting the appeal against the respondent being wound up had done so on the sole ground that it was improper to grant a winding-up order on a mention date. The Court of Appeal then set aside the winding up order and reverted the matter to the High Court to fix a hearing date for the petition.

[33] If there had been other the grounds for setting aside the winding up order for example on the ground that the debt was in dispute, one would have expected the Court of Appeal to have stated so in its oral and broad grounds of the judgment. Be that as it may this court shall still proceed on whether there was a disputed debt for which the petitioner sought to wind up the respondent.

[34] The evidence of the goods that had been sold and delivered and services rendered are in the statements of accounts and the invoices exhibited and marked as exh DPP1 in the petition. There are 158 different invoices with their numbers set out and dated from 29 September 2003 to 26 October 2004 and with the various amounts for each invoice set out totalling RM74,092.63. One would have thought that if there had been a genuine dispute on any of the invoices the respondent would specify which invoice was in dispute but that had not been forthcoming. Some vague references have been made to some understanding on some discount to be given, some debit notes not taken into

account and that generally the accounts have not been finalised. That would not do to convert the sum claimed into a disputed debt.

[35] it (It) might be apposite for one to refer to the dicta of His Lordship Chong Siew Fah J (as he then was) in *Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Hong* [1987] 1 MLJ 139 where at pp 141–142, though spoken in the context of a summary judgment application, is nevertheless relevant in determining whether there is a bona fide dispute on the debt:

> In an action for price of goods sold and delivered it is not sufficient for the defendant to merely deny the debt; he must plead any facts which negative the existence of the debt of which show that the claim is not maintainable on other grounds.
>
> With respect, the above general denial is, in my view, bad in law. In an action for price of goods sold and delivered, it is not sufficient for the defendant to merely deny the debt; he must plead any facts which negative the existence of the debt or which show that the claim is not maintainable on other grounds e.g. the contract or order, the delivery, or the amount claimed (see *The Supreme Court Practice* 1982 Vol 1 para 18/13/5. Bullen & Leake on *Precedents of Pleadings* (12th Ed), at p1278). See also *Chong Chow Fong v Ban Tuck (M) Sdn Bhd* [1983] 2 CLJ 25 at p 26 where Edgar Joseph Jr J said:
>
> > The record provided shows that the defence filed merely denied that the sum claimed or any part thereof was owing by the appellant to the respondent who was put to strict proof.
> >
> > Such a defence is bad in law because in an action for goods sold and delivered the defendant must not merely plead a denial of the debt but must plead any facts which negative its existence or show that the action is unsustainable on other grounds, for example, the order or contract, the delivery or the amount claimed. Indeed, if a defendant by his statement of defence simply 'puts the plaintiff to proof of the several allegations in their statement of claim' the defendant will be taken as admitting the claims alleged in the statement of claim and the plaintiff would be entitled to judgment without adducing any evidence in support of his case: (see *Harris v Gamble* (1878) VII Ch D p 877).

[36] Indeed to allow evidence of an oral understanding on some discount to be given and the allegation of some debit notes not taken into account without saying which debit notes and that the accounts had not been finalised and that payments need only to be made after the goods were sold would run counter to the clear words of the invoice which had stated when the payments are to be made. It would be offending s 92 of the Evidence Act and hence inadmissible as was highlighted in the Federal Court case of *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124 at p 125:

> In our view, the respondents' contention that goods were not ordered on their behalf must fail in view of the sales invoice and the delivery note. As regards the second proposition that the goods were ordered on behalf of Syahazam Sdn Bhd, the respondents relied upon the letter to prove that contemporaneously with the sales

invoice and delivery note there was an oral agreement that the respondents were acting as an agent for Syahazam Sdn Bhd in order to get over the difficulties of Syahazam Sdn Bhd having exceeded their credit limits, and therefore without this sort of arrangements no further goods would be supplied to them …

The sales invoice and the delivery note being the contract reduced in writing between the appellants and the respondents s 92 therefore applies. Hence, no value could be placed on the content of this letter and the affidavit of Zainab bt Tamby pertaining to the goods being ordered by her on behalf of Syahazam Sdn Bhd …

In view of s 92 of the Evidence Act and *Higgins v Senior* 151 ER 1279, we do not think that this is the correct view to be takes of this case. In our view, it is unnecessary for the court to examine the nature of the transaction any further because, irrespective of whether the respondents were ordering those goods on behalf of Syahazam Sdn Bhd the sales invoice and the delivery note plainly show that the respondents were the purchaser and the receiver of the goods, and no one else …

[37] The proper perspective on the sum sought to be recovered in a winding up petition when the respondent is disputing the correctness of the amount and sometimes making much ado about the minuscule and not stating even if it is prepared to pay on what it considers to be undisputed is to be had by reference to s 218(2)(a) of the Companies Act 1965 which reads:

(2) A company shall be deemed to be unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred dollars then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

[38] As was rightly pointed out in *Ann Joo Metal Sdn Bhd v Pembenaan MY Chahaya Sdn Bhd* [2005] 5 MLJ 708 at pp 718–719:

Whether the outstanding sum is RM183,025.95 or RM170,256.70 it is well beyond the RM500 in s 218(2)(a). In *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447, there was a claim for RM127,159. The respondent admitted in affidavit that it owed RM60,580. The court allowed the winding up, holding:

In our judgment, as the debt of RM60,580 is not disputed the respondent company is caught under s 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant.Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it. If an order of winding up is made the respondent company can still defend on the

> balance amount in dispute. Under the Act the liquidator may defend any action or other legal proceedings in the name and on behalf of the company which has been ordered to be wound up. The Act also provides for the fixing of dates on which creditors are to prove their debts or claims against the company. Even where the whole amount of debt claimed is disputed the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

The court is not deciding in this petition whether the amount outstanding is RM183,025.95 or RM170,256.70. The respondent is not prevented from challenging the amount before the liquidator. It should not be overlooked that the operative provision in the winding up petition is s 218(1)(e), and that s 218(2)(a) is only a deeming provision as to ability to pay debts. *The respondent in disputing the amount claimed as due, has not shown it is able to pay any lesser debt.* In as much as a party owing a debt is not excused from making payment merely because it made a proposal to pay or that its proposal is not accepted, a respondent is not protected from a winding up order under s 218 simply by purporting to dispute a sum claimed in a notice of demand without substantiating that it is a bona fide or real dispute.('emphasis added.)

[39] If there is any further doubt on this area of the law, the Federal Court had already clarified the matter in *Malaysian Air Charter Company Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 MLJ 657 where His Lordship Mohamed Dzaiddin FCJ (later CJ of Malaysia) observed at pp 667–668 as follows:

> After analysing the authorities, we would prefer the reasoning and conclusion of the Full Court of Victoria in *Re Fabo* that the court should adopt a liberal interpretation when considering the provisions of s 218(2)(a) of the Act. We have earlier set out the reasons of the Full Court for adopting a liberal interpretation and their considerations that the adoption of a literal interpretation would be difficult. We would reiterate here that we agree with *Re Fabo* that a literal interpretation of the section would compel the court not to make a winding up order notwithstanding the existence of clear evidence that an undisputed sum due exceeding RM500 has remained unpaid after a demand made without any reasonable explanation for the failure to pay. In the instant case, the statutory demand required the appellant to pay the respondent the judgment sum of RM334,118.79 together with interest at 8%pa etc as at the date of the notice. From the evidence, the aforesaid sum remained unpaid. Thus, if we were to interpret the section literally or strictly, it means no winding up order could be made as the exact amount due as at the date of the notice has not been quantified, notwithstanding that the debt exceeded RM500 and remained unpaid. By contrast, the liberal interpretation would permit the court, if proved to its satisfaction, to make a winding up order.
>
> Secondly, we agree with *Re Fabo* that commercial reality demands that 'preference be given to an interpretation that will remove from unmeritorious respondents the temptation to undertake an investigation into the exactness of the debt claimed to be owing on the relevant date in cases where complicated accounts or running accounts with daily adjustments may render probable the risk of some small errors

having been made in the course of ascertaining with precision the extent of the debt. Indeed, the possibility exists that a contrary interpretation might lead to the absurdity that an understatement of the debt in the notice would prevent the making of an order where to do so was clearly appropriate'.It is necessary to consider the factual situation presented in this appeal for the unreality of the literal approach to become evident. Here, the appellant was required to pay the respondent the judgment sum of RM334,118.79 together with interest thereon at the rate of 8%pa on all outstanding sums from 28 October 1988 until the date of realisation.

Conclusion

For the above reasons, our answer to the two questions posed in the appeal is that s 218(2)(a) of the Act should be liberally interpreted. A notice of demand under the subsection need not specify the exact sum due as at the date of the demand. So long the sum due exceeds RM500 and remained unpaid after a demand made without any reasonable explanation to the satisfaction of the court, there is therefore neglect to pay such sum within the meaning of the section. It should however be borne in mind that s 218(2)(a) does not create separate grounds for winding up, but provides a mode of proof available in aid of an application seeking a winding up on the ground specified in s 218(1), viz, that the company is unable to pay its debts (Ataxtin). A company will not be wound up, even if it fails to heed a valid notice, if it can establish by independant evidence that it is solvent (*Re Fabo*).

In adopting the *Re Fabo* approach to the interpretation of s 218(2)(a) of the Act, we have therefore differed from the High Court decision of *Re Perusahaan Jenwatt* which followed *Processed Sand*. The Supreme Court in *Sri Hartamas* likewise adopted a literal interpretation in dealing with the question whether under s 218(2)(a), a company was entitled to have three weeks after service of the notice of demand to either pay, secure or compound the sum demanded. The court also took the opportunity to agree with *Re Perusahaan Jenwatt* that a demand did not fall within s 218(2)(a) if the amount demanded exceeded the sum actually due. With respect, we consider this passage in the judgment of Gunn Chit Tuan SCJ obiter because the claim of the excess sum in the notice was never an issue before the court. In fact, the amount stated in the notice was not in dispute.

Lastly, returning to the instant case under appeal, it is worth noting that the Court of Appeal found that the facts therein are on all fours with the facts in *Sri Hartamas*. The Court of Appeal followed *Sri Hartamas*, on the basis of stare decisis, which in effect held that although the statutory notice did not quantify the interest due, it was still a good and valid notice. The Court of Appeal did not make any specific finding whether s 218(2)(a) is to be interpreted literally as in *Re Perusahaan Jenwatt* or liberally, although its conclusion appears to be based on a liberal interpretation of the subsection.

[40] Learned counsel for respondent referred to the following cases in support of the fact that if there is a dispute on the sum owing then a winding up order should not be made. The cases are *Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd* [2000] 6 CLJ 290, *Re Nima Travel Sdn Bhd; Sun Soon Heng Coach Works Sdn Bhd v Nima Travel Sdn Bhd* [1986] 2 MLJ 374, *NKM Development Sdn Bhd v Irex Sdn Bhd* [1988] 2 CLJ (Rep) 56 and

Transwater Corporation v Idris Hydraulic (Malaysia) Bhd [2001] 1 CLJ 162. All these cases must now be read in the context of and be circumscribed by the decison of the apex court in *Malaysian Air Charter Company Sdn Bhd v Petronas Dagangan Sdn Bhd*'s case.

PRONOUNCEMENT

[41] It is pertinent to note that nowhere in the respondent's affidavit of Mohd Nor bin Abdul Raman in encl 53 filed on 23 August 2011 had it been averred that the respondent is solvent and that it is able to pay its debts, at least the part substantially not in dispute assuming for a moment the dispute raised is bona fide.

[42] In the circumstance I was constrained to allow the petition to wind up the respondent and I further ordered as prayed that the Director General of Insolvency be appointed the provisional liquidator of the respondent. Further costs of and incidental to this petition shall be paid out of the assets of the respondent.

[43] I had earlier for the reasons stated above dismissed with costs both the respondent's applications to strike out the petition ('encl 50) and to cross-examine the deponent of the petitioner's affidavit verifying the petition ('encl 52).

Petition to wind up respondent allowed and encls 50 and 52 dismissed with costs.

Reported by Ashok Kumar